

**BURSOR & FISHER, P.A.**

L. Timothy Fisher (State Bar No. 191626)  
Annick M. Persinger (State Bar No. 272996)  
Yeremey O. Krivoshey (State Bar No. 295032)  
1990 North California Blvd., Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
apersinger@bursor.com  
ykrivoshey@bursor.com

*Attorneys for Plaintiffs*

SCOTT M. VOELZ (S.B. #181415)  
svoelz@omm.com  
DANIEL J. FARIA (S.B. #285158)  
dfaria@omm.com  
**O'MELVENY & MYERS LLP**  
400 South Hope Street  
Los Angeles, California 90071-2899  
Telephone: (213) 430-6000  
Facsimile: (213) 430-6407

*Attorneys for Defendant  
Millennium Products, Inc.*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA, KIRSTEN  
SCHOFIELD, and JESSICA MANIRE  
on Behalf of Themselves and all Others  
Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC.

Defendant.

Case No. 2:15-cv-01801

**JOINT FRCP 26(f) AND L.R. 26-1  
REPORT**

Judge: Honorable Philip S. Gutierrez

1 The parties, by and through their respective counsel, respectfully submit their  
2 Joint Federal Rules of Civil Procedure Rule 26(f) and Local Rule 26-1 Report.

3 **A. Nature of the Action**

4 Plaintiffs' Statement. Plaintiffs allege that Millennium labels its GT's  
5 Kombucha Beverages with unauthorized nutrient content claims regarding  
6 antioxidant claims. Plaintiffs allege that Millennium's advertising and labeling fails  
7 to meet the minimum regulatory requirements for antioxidant claims because GT's  
8 Kombucha Beverages do not contain any nutrients with an established Reference  
9 Daily Intake ("RDI") and do not identify any nutrients approved for their antioxidant  
10 claims. Plaintiffs allege Millennium's antioxidant labeling misleads consumers and  
11 misbrands the products.

12 Accordingly, Plaintiffs Retta, Schofield, and Manire assert claims on behalf of  
13 themselves and the proposed Class of GT's Kombucha Beverages purchasers for  
14 violation of the Consumer Legal Remedies Act (CLRA), for violation of California  
15 Unfair Competition Law ("UCL") and for violation of the California False  
16 Advertising Law ("FAL"). Plaintiffs Retta and Manire assert claims individually  
17 and on behalf of the members of the proposed New York subclass of GT's  
18 Kombucha Beverages purchasers for violation of the New York General Business  
19 Law § 349 ("NYGBL"). Plaintiff Manire asserts claims individually and on behalf  
20 of the members of the proposed California subclass of GT's Kombucha Beverages  
21 purchasers for violation of the CLRA, UCL and FAL.

22 Defendant's Statement. Defendant Millennium Products, Inc. ("Millennium")  
23 is the maker of the popular "GT's" line of fermented tea beverages, including the  
24 Enlightened Kombucha and Enlightened Synergy products at issue in this action.  
25 Millennium stands by its labeling practices, which are truthful and not misleading for  
26 the simple reason that the accused products contain antioxidants as advertised.  
27 Regardless, Millennium does not expect that Plaintiffs' claims will proceed to the

1 merits as Plaintiffs will not be able to certify a class. At minimum, a host of  
2 individualized issues will predominate in any trial of Plaintiffs' claims, Plaintiffs will  
3 not be able to pursue claims as to Millennium products they have not purchased, and  
4 Plaintiffs will not be able to assert California law claims on behalf of a nationwide  
5 class under *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012).

6 **B. Service**

7 Plaintiffs Jonathan Retta, Kristen Schofield and Jessica Manire served their  
8 initial complaint on March 11, 2015.

9 **C. Possible Joinder of Additional Parties**

10 At this time, the parties do not anticipate joinder of any additional parties.  
11 Should the need for joinder arise in the future, the parties will promptly notify the  
12 Court.

13 **D. Amendment of Pleadings**

14 Plaintiffs filed their complaint on March 11, 2015. Defendant filed its initial  
15 motion to dismiss on April 28, 2015. Plaintiffs filed their First Amended Complaint  
16 ("FAC") on May 19, 2015. Defendant filed a motion to dismiss or strike the FAC on  
17 June 19, 2015. The Court is scheduled to hear Defendant's second motion to dismiss  
18 on August 31, 2015. In the event the Court dismisses any section of the FAC with  
19 leave to amend, Plaintiffs may amend their complaint. Moreover, because none of  
20 the parties have yet responded to any discovery requests, the parties, claims, or  
21 defenses may be altered as needed in the future.

22 **E. Jurisdiction and Venue**

23 Plaintiffs assert that the Court has subject matter jurisdiction in this action  
24 pursuant to 28 U.S.C. § 1332(d). The parties agree that there are no existing issues  
25 regarding personal jurisdiction or venue.  
26  
27  
28

1           **F. Pending and Anticipated Motions**

2           Currently, Defendant's motion to dismiss the FAC is pending. Plaintiffs'  
3           opposition to Defendant's motion to dismiss the FAC is due on or before July 24,  
4           2015. Defendant's reply in support of the motion to dismiss is due on or before  
5           August 7, 2015. The hearing on Defendant's motion to dismiss the FAC is  
6           scheduled for August 31, 2015.

7           Plaintiffs' Statement. Plaintiffs seek to move for class certification at a  
8           reasonable time after the final resolution of the pleadings. Plaintiffs propose that  
9           their motion for class certification be filed 150 days after the pleadings are settled,  
10          that Defendant's response and related papers be filed 30 days thereafter and that  
11          Plaintiffs' reply in support of class certification be filed 30 days thereafter. Plaintiffs  
12          further propose that the hearing for class certification take place 14 days after the  
13          filing of Plaintiffs' reply in support of class certification, or at a date and time  
14          convenient for the Court.

15          At this time, Plaintiffs do not anticipate filing a dispositive motion. However,  
16          Plaintiffs propose that dispositive motions be heard on or before September 26,  
17          2016.

18          Defendant's Statement. Millennium has filed a motion to dismiss or strike the  
19          FAC. That motion is currently scheduled to be heard on August 31, 2015. If the  
20          Court denies the motion (either on the current complaint or any future amended  
21          complaints), Plaintiffs will move for class certification. If the Court grants the  
22          motion with leave to amend, Millennium may move to dismiss or strike any  
23          subsequent complaints. Because the pleadings in this action are not settled,  
24          Millennium believes that it is premature to set specific dates for briefing on  
25          Plaintiff's motion for class certification or specific pretrial dates. Thus, Millennium  
26          proposes a schedule for class certification briefing and related expert discovery  
27          running from the date when Defendant files its answer, if any. This schedule  
28

contemplates deadlines for expert discovery related to class certification and a staged briefing schedule, with 60 days between briefs, so that the parties may conduct discovery in response to each party's briefing.

**Millennium's Proposed Schedule**

<b>Event</b>	<b>Date</b>
Initial Disclosures	14 Days After Defendant Files Answer
Opening Class Certification Brief	180 Days After Defendant Files Answer
Opposition Brief	60 Days from Filing of Opening Brief
Reply Brief	60 Days from Opposition Brief
Class Certification Hearing	30 Days from Reply Brief
Parties to Submit Status Report	14 Days from Class Certification Order

Millennium proposes that the parties should be required to disclose any experts on whom they plan to rely for class certification before the opening class certification brief. Defendant further proposes that Plaintiffs be required to disclose their experts 15 days before their Opening Brief is due and serve expert reports on the day of filing of their Opening Brief and that Millennium be required to disclose its experts 15 days before their Opposition Brief is due and serve expert reports on the day of filing of their Opposition Brief. Once the Court rules on the motion for class certification, Millennium proposes that the parties file a status report in which the parties will propose specific dates for the remainder of the litigation, including a fact and expert discovery cut-off, a deadline for filing dispositive motions, a date for the final pretrial conference, and a trial date.

1           **G.     Anticipated Discovery**

2           **1.     Timing, Form, or Requirement for Disclosures under Rule 26(a)**

3           On June 22, 2015, Plaintiffs served Defendant with their first sets of  
4 interrogatories and requests for production of documents. Plaintiffs propose that the  
5 parties make their initial disclosures two weeks after the Court issues its order on  
6 Defendant's motion to dismiss the FAC. Defendant proposes that the parties make  
7 their initial disclosures after the pleadings are resolved—specifically, two weeks  
8 after Defendant files an answer, if any.

9           **2.     Subjects on Which Discovery Will be Sought**

10          Plaintiffs' Statement. Plaintiffs intend to seek discovery regarding, among  
11 other things: (i) the content of Defendant's advertisements, product labels, marketing  
12 materials, and other public statements; (ii) studies, testing, investigation, analysis or  
13 any purported basis for Defendant's statements regarding the antioxidant and  
14 nutrient content of GT's Kombucha Beverages; (iii) Defendant's formulation and  
15 development of GT's Kombucha Beverages; (iv) GT's Kombucha Beverages'  
16 ingredient, nutrient, mineral, vitamin, and antioxidant make-up; (v) individuals  
17 consulted regarding the development, testing, and review of GT's Kombucha  
18 Beverages; (vi) studies, testing, and analysis of consumer response to Defendant's  
19 advertisements, product labels, marketing materials, and other public statements;  
20 (vii) consumer surveys, studies, analysis, consumer focus group research, and other  
21 research concerning consumer desire and preference for products containing  
22 antioxidant nutrients (viii) customer complaints regarding GT's Kombucha  
23 Beverages; (ix) the identities and number of people who have purchased GT's  
24 Kombucha Beverages; (x) the amount of revenue, nationally, and by state, derived  
25 by Defendant from the sale of GT's Kombucha Beverages; and (xi) Defendant's  
26 refund policies and practices.  
27  
28

1           Defendant's Statement. The scope of anticipated discovery by Millennium  
 2 shall include, among other subjects: (i) Plaintiffs' purchase and consumption of the  
 3 products at issue; (ii) correspondence between Plaintiffs and any other persons  
 4 regarding the products at issue; (iii) Plaintiffs' purported damages, (iv) Plaintiffs'  
 5 understanding of the labeling statements at issue; (v) the basis for Plaintiffs'  
 6 contention that the statements at issue are false and misleading; (vi) Plaintiffs'  
 7 reasons for purchasing the products at issue; (vii) Plaintiffs' exposure to the  
 8 statements at issue; and (viii) Plaintiffs' purported actual and reasonable reliance on  
 9 the statements at issue.

### 10           **3.     Deadline for the Completion of Discovery**

11           Plaintiffs' Statement. Plaintiffs propose the following schedule for discovery:

- 12           • Initial disclosures: two weeks after the Court issues its order on the motion to
- 13           dismiss.
- 14           • Expert disclosures: July 22, 2016
- 15           • Rebuttal expert disclosures: August 19, 2016
- 16           • Fact discovery and expert discovery cutoff: September 16, 2016
- 17           • Fact discovery and expert discovery cutoff: September 16, 2016

18           Defendant's Statement. As set forth above, Millennium believes that it is  
 19 premature to set case management deadlines until the pleadings are resolved, as  
 20 Millennium's motion to dismiss or strike the FAC has not been resolved and future  
 21 motions to dismiss or strike may be necessary. Millennium proposes that class  
 22 certification deadlines be triggered off of Millennium's filing of an answer, if any.  
 23 Millennium further proposes that, 14 days after the Court's ruling on Plaintiffs'  
 24 anticipated motion for class certification, the parties submit a status report proposing  
 25 case management deadlines, including a fact and expert discovery cut-off, a deadline  
 26 for filing dispositive motions, a date for the final pretrial conference, and a trial date.

1                   **4.     Phasing of Discovery**

2                   The parties agree that, at this time, phasing of discovery is not warranted or  
3 necessary.

4                   **5.     Issues about Disclosure or Discovery of Electronically Stored  
5 Information**

6                   The parties propose that the parties meet and confer in an effort to reach an  
7 agreement on an ESI protocol within the next 30 days. If they are unable to reach an  
8 agreement on an ESI protocol, they will submit any disputed issues to Magistrate  
9 Judge Wistrich for resolution.

10                  **6.     Claims Regarding Privilege and Confidentiality**

11                  Plaintiffs' Statement. Plaintiffs do not anticipate any significant privilege  
12 issues arising with regard to the documents and information in Plaintiffs' possession.  
13 Plaintiffs propose that any party withholding any documents or information based on  
14 the assertion of a privilege shall serve a privilege log that complies with the  
15 requirements of the Federal Rules of Civil Procedure within 14 days after completing  
16 the production of documents responsive to the document request to which the  
17 privilege was asserted. *See* Fed. R. Civ. P. 26(b)(5); *see also Ramirez v. County of*  
18 *Los Angeles*, 231 F.R.D. 407, 410 (C.D. Cal. 2005) ("The party who withholds  
19 discovery materials must provide sufficient information (*i.e.* a privilege log) to  
20 enable the other party to evaluate the applicability of the privilege or protection.").

21                  Defendant's Statement. Millennium anticipates that a protective order will be  
22 needed to protect certain confidential and privileged information in the possession of  
23 Millennium. To that end, Millennium contemplates proposing a protective order to  
24 Plaintiffs and that, to the extent they are able to reach an agreement on a protective  
25 order, that the parties will submit a suitable protective order for the Court's  
26 consideration. If the parties cannot reach such an agreement, Millennium intends to  
27 file a motion for a protective order.



1                   **7. Changes to the Limitations of Discovery Imposed by the Federal**  
 2                   **Rules of Civil Procedure**

3                   At this time, the parties do not believe that it is necessary to modify the  
 4                   limitations on discovery imposed by the Federal Rules of Civil Procedure.

5                   Nevertheless, if the parties determine that additional discovery is necessary, they will  
 6                   seek the Court's permission to adjust the limits or extend any deadlines.

7                   **H. The Scheduling of Trial and Trial Estimate**

8                   Plaintiffs' Statement. Plaintiffs propose a final pre-trial conference on  
 9                   October 18, 2016 at 2:30 p.m. Plaintiffs propose November 1, 2016, as the first day  
 10                  of trial and estimate the trial will last two to three weeks.

11                  Defendant's Statement. As set forth above, given that the pleadings are not  
 12                  settled and that it is uncertain whether additional motion practice to resolve the  
 13                  pleadings will be necessary, Millennium believes that it is too early to provide a  
 14                  reasonable trial estimate or to propose pretrial conference and trial dates. Once the  
 15                  contours of the litigation are determined, following the Court's ruling on Plaintiff's  
 16                  motion for class certification, Millennium proposes that the parties confer and  
 17                  propose a trial estimate to the Court.

18                  **I. Modification of Pretrial Procedure**

19                  The parties do not anticipate any need for modification of the Court's standard  
 20                  pretrial procedures.

21                  **J. Manual for Complex Litigation**

22                  Plaintiffs' Statement. Even though this is a nationwide class action, given the  
 23                  straightforward factual allegations and that the case involves only a single defendant,  
 24                  Plaintiffs do not believe that this is a particularly complex case. However, as a class  
 25                  action, the class certification guidelines set forth in the *Manual for Complex*  
 26                  *Litigation* may be instructive to this Court in the management of this case.

27                  Defendant's Statement. Millennium does not believe that Plaintiffs will be  
 28                  able to certify a class or that any of Plaintiffs' claims are suitable for classwide

1 treatment on any basis. Accordingly, at this early state in the litigation, Millennium  
 2 does not propose the adoption of any particular procedure from the *Manual for*  
 3 *Complex Litigation*.

#### 4 **K. Related Cases**

5 The parties are not aware of any related cases pending in this District, or  
 6 otherwise.

#### 7 **L. Settlement Conference**

8 As required by L.R. 26-1, the parties have discussed the three ADR  
 9 procedures specified in L.R. 16-15.4. The parties propose ADR Procedure No. 2.  
 10 The parties propose an early date to conduct a settlement conference or mediation to  
 11 determine if this case is suitable for early resolution.

#### 12 **M. Other Issues**

13 The parties are not aware of any other issues affecting the status or  
 14 management of the case at this time.

15  
 16 Dated: July 6, 2015

**BURSOR & FISHER, P.A.**

17  
 18 By: /s/ Yeremey Krivoshey  
 19 Yeremey Krivoshey

20 L. Timothy Fisher (State Bar No. 191626)  
 21 Annick M. Persinger (State Bar No. 272996)  
 22 Yeremey O. Krivoshey (State Bar No. 295032)  
 23 1990 North California Blvd., Suite 940  
 24 Walnut Creek, CA 94596  
 25 Telephone: (925) 300-4455  
 26 Facsimile: (925) 407-2700  
 27 Email: ltfisher@bursor.com  
 28 apersinger@bursor.com  
 ykrivoshey@bursor.com

*Attorneys for Plaintiffs*

1 Dated: July 6, 2015

**O'MELVENY & MYERS LLP**

2 By: /s/ Scott M. Voelz  
3 Scott M. Voelz

4 SCOTT M. VOELZ (S.B. #181415)  
5 svoelz@omm.com  
6 DANIEL J. FARIA (S.B. #285158)  
7 dfaria@omm.com  
8 O'MELVENY & MYERS LLP  
9 400 South Hope Street  
10 Los Angeles, California 90071-2899  
11 Telephone: (213) 430-6000  
12 Facsimile: (213) 430-6407

13 *Attorneys for Defendant*  
14 *Millennium Products, Inc.*